STATE OF MICHIGAN
IN THE SUPREME COURT

MILISSA McCLEMENTS,

Plaintiff-Appellee and
Cross Appellant,

-vs-

FORD MOTOR COMPANY,

Defendant-Appellant and
Cross Appellee.

Supreme Court Case No. 126276
Court of Appeals No. 243764
Oakland County No. 00-034444-CL

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PLAINTIFF-APPELLEE'S BRIEF IN SUPPORT OF HER CROSS APPEAL

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

This Court granted defendant-appellant Ford Motor Company's application for leave to appeal from the unpublished opinion of the Court of Appeals issued April 22, 2004 (Cross App Apx, 52a), which had reversed the Oakland County Circuit Court's August 2, 2002, Opinion and Order granting summary disposition to the defendant Ford on plaintiff's negligent retention claim (Cross App Apx, 37a).

This Court also granted plaintiff-appellee Milissa McClements' cross application for leave to appeal from the unpublished Opinion of the Court of Appeals insofar as it affirmed the decision of the Oakland County Circuit Court that plaintiff had not stated a claim for relief under the Elliott-Larsen Act, MCL 37.2101, et. seq.

This Court has jurisdiction over the appeal and the cross appeal under MCR 7.302(d)(2).

STATEMENT OF QUESTIONS PRESENTED ON THE CROSS APPEAL

I

Whether the plaintiff Milissa McClements, an employee of a food vendor at Ford's Wixom Assembly Plant, may bring an action against Ford Motor Company under the Elliott-Larsen Act, MCL 37.2101, et. seq., for a sexually hostile work environment perpetrated upon her at that plant by Daniel Bennett, a Ford manager who worked at that location?

II

Whether Ford may be held responsible under the Elliott-Larsen Act, MCL 37.2101, et. seq., for the Bennett's two attempts to forcibly kiss and have sex with McClements on the basis that Ford failed even to investigate prior reports that Bennett, had, while performing duties for the company, sexually harassed three high-school girls and one Ford employee so severely that his acts constituted multiple sexual offenses under the criminal laws of the State of Michigan?

INTRODUCTION

Four women who worked at Ford Motor Company's Wixom Assembly Plant have filed actions asserting that the company is responsible for the sexual harassment they endured at that plant because it failed even to investigate repeated reports that Daniel Bennett, a superintendent at that plant, had perpetrated numerous acts of severe sexual harassment upon them and upon other women during the course of his work for Ford.[1]

In this case, Milissa McClements, a cashier for a food vendor at the plant, asserts that on two occasions in late November or early December 1998, Bennett came into the cafeteria where she worked at a time when he knew she would be alone, grabbed her from behind, spun her around, and attempted to force his tongue into her mouth. During the second assault, he asked McClements where they could go to have sex and told her that he knew that she wanted it.

McClements asserts that Ford is at fault for these two sexual assaults upon her because it had ignored earlier reports from reliable sources that Bennett had (1) exposed himself to three high-school students and (2) had, while exposing himself, assaulted a Ford employee on three occasions by tugging at her clothing, grabbing at her breasts, and, on one occasion, by forcing her hand onto his exposed penis.

In Count One of her action, McClements asserted that Ford is responsible for Bennett's sexual assaults upon her because it breached its obligation under the Elliott-Larsen Act to prevent sexual harassment by failing to take prompt and effective remedial

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[1] This case and two others are currently pending in this Court. *Elezovic v Ford Motor Company and Bennett*, 259 Mich App 187, 673 NW 2d 776 (2003), *app lv granted* Sup Ct No 125166; *Maldonado v Ford Motor Company,* 2004 WL 868657, *app lv pending* Sup Ct Case No. 126274. The fourth case was just argued in the Court of Appeals. *Perez v Ford Motor Company and Bennett, appeal pending,* Ct App No. 249737.

action on the prior complaints. In Count Two, she alleged that the same inaction breached Ford's common-law duty to use due care in the supervision and retention of its managerial employees.

After discovery was closed, the Oakland County Circuit Court granted Ford and Bennett's motion for summary disposition under MCR 2.116(c)(10). On April 22, 2004, the Court of Appeals reversed the circuit court and remanded McClements' common-law claim for trial on the merits. The Court of Appeals, however, affirmed the circuit court's dismissal of her statutory claim.

Ford appealed from the Court of Appeals' decision finding that McClements had stated a common-law claim for negligent retention, while McClements cross appealed from the Court of Appeals' decision finding that she had not stated a claim under the Elliott-Larsen Act.

The factual basis for the two appeals is identical. McClements has therefore set forth below a full statement of facts relevant to her cross appeal and Ford's appeal.

The legal issues in the appeal and cross appeal are not identical, but they do overlap substantially, largely because the Elliott-Larsen Act ("the Act"), MCL 37.2101, et. seq., has adopted the standards of the common law for judging an employer's respondeat superior liability. In her legal argument in support of her cross appeal, McClements has therefore summarized the common-law background for the standards that this Court has adopted under the Act. But she has reserved a full discussion of the common law for the brief that she will file in response to Ford's brief in support of its appeal.

As the Opinion of the Court of Appeals accurately states many of the key facts necessary to decide the appeal and the cross appeal, McClements has relied, where possible, on the facts as stated in that Opinion. In a few crucial areas, however, the Court of Appeals either summarized or omitted key facts, and, in those areas, McClements has amplified the discussion of the facts with quotations and citations from the record.

As the circuit court dismissed this case on a motion for summary disposition, McClements assumes the truth of the facts set forth in the record and presents those facts in the light most favorable to her claim.

STATEMENT OF FACTS

A. Bennett's sexual harassment of McClements.

In March 1998, McClements, then age 28, began work with AVI Food Systems, Inc ("AVI"), a contractor operating three cafeterias inside Ford's Wixom plant. At all relevant times, AVI paid McClements' wages, provided her benefits, and set her hours (Cross App Apx, 52a, Ct App Op, 1; Dep of McClements, 79a-80a, 200-208). Ford, however, dominated the environment in which McClements worked.

AVI's cafeterias are located in Ford's plant. At breaks and lunches, Ford's employees flood the cafeterias, dwarfing the small contingent of AVI employees. As a cashier, McClements had daily contact with hundreds, if not thousands, of Ford employees (Cross App Apx, 68a-69a, Dep of McClements, 125-133).

Before Bennett assaulted McClements, some Ford employees--including another supervisor--made inappropriate comments about her appearance or asked her to go on business trips with them or to meet them after work (Cross App Apx, 84a-85a, Dep of McClements, 502-503, 505-508). However unpleasant that harassment was, it paled in

comparison to what Bennett would soon do (Cross App Apx, 86a-87a, Dep of McClements, 549-550).

McClements first met Bennett, the superintendent of the Pre-Delivery Department, as he proceeded through the serving line in Cafeteria Two at the Wixom plant. At that time, Bennett merely talked with McClements at the cash register. On three or four occasions, however, he asked her to meet him at a Taco Bell after work. She refused. As McClements testified, he was extremely insistent and she did not see his requests as ones for a date but rather for something very different (Cross App Apx, 52a, Ct App Op, 1; Dep of McClements, 18-19, 159-166).

After McClements turned down Bennett's requests, he resorted to force. In late November or early December 1998, Bennett came into the cafeteria between breaks when he knew that McClements would be alone. McClements described what Bennett then did:

> I was facing the opposite way. He came up and just grabbed me and turned me around and stuck his tongue in my mouth. And I pushed him away and told him no. And he had said something about me smoking a cigarette...And I told him that, I think you should leave. And I had gone through the other door and went back to doing my job as best as I could. There was no one else there. I specifically looked.
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> (Cross App Apx, 52a, 71a, Ct App Op 1; Dep of McClements, 137-138).

Bennett left, but a few days later, he returned and assaulted McClements again:

> He had come in, and I was in the kitchen, and [he] came up behind me, grabbed me, kind of turned me around, and at this point, I am not 100 percent sure that he actually got his tongue in my mouth that time. It was pretty darn close, though, if he didn't. And I told him, no. And he said, come on, you know you want it. Isn't there somewhere in here we can go and have sex? And he was looking around the kitchen. And I told him no, get out, good-bye, and I walked away.
>
> (Cross App Apx, 52a, 71a, Ct App Op 1; Dep of McClements, 138).

Bennett again left after McClements had pushed him away.

Shortly after the second assault, McClements told her union steward, Faith Marquis, what Bennett had done and asked if she should report it (Cross App Apx, 76a, Dep of McClements, 177-179). Marquis told her that reporting was the "right thing" to do but that Ford was not to be trusted and would "...turn around and stab you in the back and you [would] end up losing your job" (Cross App Apx, 77a, Dep of McClements, 183). McClements recalled these words from Marquis:

> And she [Marquis] said, well, missy [McClements' nickname] I don't know, it's up to you but I don't think it's going to do any good. I wouldn't risk my job over it, if I were you.
>
> (Cross App Apx, 77a, Dep of McClements, 182-183).

Following Marquis's advice, McClements did not report to Ford or AVI what Bennett had done until August 2001 (Cross App Apx, 52a-53a, 66a-67a, 77a, Ct App Op, 1-2; Dep of McClements, 96-97, 183-184).

For unknown reasons, however, shortly after Christmas, Bennett stopped using Cafeteria 2. In late January, McClements moved to a different cafeteria in order to be sure of avoiding Bennett. She was largely successful, and Bennett never harassed her again, other than smirking at her on two occasions when she saw him inside the plant (Cross App Apx, 88a-89a, Dep of McClements, 569-572).

The assaults by Bennett, however, continued to disturb McClements greatly. When she became involved with a man who worked at the plant (whom she subsequently married), she told him what Bennett had done. As she testified, telling her boyfriend about those events "stirred up everything I was trying to push down and forget about"

and it "started really bothering me that I couldn't forget about it" (Cross App Apx, 81a, Dep of McClements, 359).

As McClements described it, Bennett's assaults continued to be "very upsetting" to her because she believed that she would be fired if she reported the assaults, but she also believed that she was protecting Bennett by failing to report the assaults (Cross App Apx, 81a, Dep of McClements, 360-361). She suffered from frequent headaches and bouts of depression, caused, she believed, by the ongoing "struggle in my own mind" over whether to report what Bennett had done (Cross App Apx, 81a-83a, Dep of McClements, 361-369).

B. Ford's prior failure to take action to stop Bennett's severe sexual harassment of women.

In December 1998, McClements did not know that Ford had already received three reports that Bennett had perpetrated severe sexual harassment on four different women. As Marquis had suspected, but not known, Ford had done nothing about any of these reports.

The Wixom Police filed the first report on August 24, 1995. On the previous evening, Bennett had, like all superintendents at the plant, taken a Ford M-10 car randomly selected from the plant's daily production to use for his drive to and from work. The car, however, was not merely a disguised fringe benefit. Under policies announced by Harold Poling, the President of Ford, Bennett and other top managers drove a different M-10 car to and from work each day as part of Ford's worldwide quality control effort. Ford required the managers to complete an elaborate checklist on each car so that the company could discover and correct production defects as soon as possible (Cross App Apx, 123a-124a, 128a-131a, Letter of Poling, Checklist).

On August 23, however, Bennett's was not concerned with evaluating Ford's product. As set forth in the report of the State Police, immediately after Bennett pulled out of the plant parking lot, he began following three high-school girls south on Wixom Road onto I-96 east and I-275 south. As they drove on I-275, Bennett pulled alongside the car, waving his arms to signal the young women to pull off. When they did not, he drove next to their van, and, at high speed, rose up from his seat to display his exposed penis to the terrified high-school students. He then exited the freeway at high speed (Cross App Apx, 111a-113a, State Police Report).

The girls wrote down the plate number. They called the police, who quickly traced the car to the Wixom plant. Working jointly with Ford, the officers soon identified the driver as Bennett. At 11:23 P.M. on August 23, Donald Fabbris, a security supervisor at the plant, sent an e-mail to Michael Sweeney, Ford's Security Director, and Ezra Carter, the Personnel Manager, advising them that the police had reported that Bennett had exposed himself to high-school girls while test driving Ford's M-10 car (Cross App Apx, 111a, 120a, State Police Report, E-mail of Fabbris).

Despite notice to top officials of egregious abuse of innocent young women, Ford did not investigate the charges. Nor did it ever remedy the abuse that Bennett had perpetrated. Indeed, years later, when the Plant Manager testified in a deposition in the *Elezovic* case, he declared that even in the face of testimony from the three high-school girls and a conviction, he still believed that Bennett was innocent:

> Q: [By Atty Alice Jennings] Do you now still believe Dan is innocent of all charges?
>
> A: [By Plant Manager Jeffrey Haller] Based on the facts that I've reviewed and my exposure to it, yes, I still support him.

(Cross App Apx, 110a, Dep of Haller, 82, lines 5-6).

When asked why, the Plant Manager said "[my] exposure and, very honestly, my dealings with [Bennett] and observing him in the plant, these facts don't demonstrate to me that he was that kind of individual" (Cross App Apx, 110a, Dep of Haller, 81, lines 13-18).

In October 1998, however, top Ford officials received two more reports that Bennett was "that kind of individual." Joe Howard, who had just been appointed Production Manager at Wixom,[2] received the first report when he paid an unannounced visit to the home of Justine Maldonado, a Ford Wixom employee who was the niece of the woman whom Howard had married a few years before. Unknown to Howard, Maldonado, like McClements would soon do, was agonizing over whether she should report what Bennett had done to her. When Howard turned up at her home, Maldonado took it as a sign that she should file that report (Cross App Apx, 97a, 99a, Dep of Maldonado, 205-206, 433-435).

She told Howard that in late January or early February 1998, Bennett, as the manager of her department, gave her a routine work direction to use a production vehicle to follow him to the repair building at the plant. Bennett left his car there and got in her car for the return ride to the plant, seemingly in accord with normal procedure. But then Bennett began asking Maldonado to meet him after work. Suddenly, he exposed himself. While tugging on her blouse, he demanded that Maldonado perform oral sex upon him. Terrified and disgusted, Maldonado refused, got out of the car, and left the area (Cross

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[2] In October 1998, Howard had been appointed as Production Manager, but was actually serving as a Ford Production System Coordinator, a position at the same level as the Production Manager (Cross App Apx, 102a-103a, Dep of Howard, 7-9).

App Apx, 53a, 91a-92a, 98a-99a, Ct App Op, at 2; Dep of Maldonado, 103-105, 431-435).

In the conversation at her home, Maldonado told Howard that Bennett had done the same thing to her two days later (Cross App Apx, 93a-94a, Dep of Maldonado, 106-110). She further told Howard that Bennett had later made repeated obscene gestures with his tongue, grabbed his crotch, and otherwise attempted to degrade and demean her in the plant at times and places when she was alone. Finally, she told Howard that in June 1998, Bennett had followed her off I-275 onto a largely deserted stretch of Michigan Avenue. When she pulled into the parking lot of a florist shop for what she hoped would be safety, Bennett brazenly got of his car, walked up to Maldonado's vehicle, and reached in and began tugging at her blouse. When she again said No, Bennett returned to his car. As Maldonado drove away, she looked back to see him sitting in his car, masturbating. (Cross App Apx, 94a-96a, 99a, Dep of Maldonado, 113-124, 433-435).

Ford's "Anti-Harassment Policy" made clear that Howard had a duty to report what Maldonado had told him to the appropriate Human Resources Personnel:

> Special Responsibilities of Managers and Supervisors…
>
> --Report any incident or harassment or retaliation that you witness or become aware of to the appropriate Human Resources personnel.
>
> --Report *all* complaints of harassment or retaliation to the appropriate Human Resources personnel, regardless of your opinion of whether the complaint is well-founded.
>
> --After reporting the incident or complaint to Human Resources, cooperate with Human Resources to assure that the problem does not recur or that retaliation does not ensue.
>
> (Cross App Apx, 122a, under "Responsibility of Employees")(emphasis in original).

When and whether Howard actually reported what he learned from Maldonado to Human Resources will never be known, because Howard would later claim that his conversation at her did not occur until November 1999.

For purposes of this record, Howard's dispute with Maldonado over the date on which she reported the abuse to him is irrelevant because her testimony must be assumed to be true. Moreover, whether Howard actually reported the abuse to Human Resources is also irrelevant, because Howard, by any reasonable standard, was a top manager himself, reporting at all relevant times directly to the Deputy Plant Manager (Cross App Apx, 103a, Dep of Howard, 11-12). Finally, whether Howard reported what Maldonado told him to Human Resources or not is also irrelevant because Ford's Director of Labor Relations soon learned by another channel what Bennett had done to Maldonado.

As Maldonado testified, a few days after she talked with Howard and before her November 2 knee surgery, she ran into David Ferris, her former superintendent and an old friend, as she walked down an aisle in the plant. When Ferris told Maldonado that he was on a temporary assignment in Labor Relations,[3] she told Ferris what Bennett had done (Cross App Apx, 97a, Dep of Maldonado, 205-208). To his credit, Ferris went to Bennett two or three days later and confronted him with the charges. Ferris testified that Bennett just laughed and walked away (Cross App Apx, 107a, Dep of Ferris, 57-58).

Ferris was angry and decided that Maldonado's report had now become "a company matter." He testified that he believed he had a "responsibility to the company and to myself and Ms. Maldonado" to report the harassment. The day after he talked to

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[3] Ferris's duties in Labor Relations included handling overflow work for Labor Relations Representatives. He was trained in gathering information for grievances, preparing reports, and handling medical cases (Cross App Apx, 105a-106a, Dep of Ferris, 8-10).

Bennett, he went to his boss, Jerome Rush, Wixom's Director of Labor Relations, and told him that Maldonado said that Bennett had sexually harassed her. Rush told Ferris that he was not a labor relations representative and that he should not be involved in such matters (Cross App Apx, 107a-109a, Dep of Ferris, 58-63). Six weeks later, Rush advised Ferris to take the buyout that the company had offered to him—and Ferris left, never to return to Ford (Cross App Apx, 106a, Dep of Ferris, 12).

Just as Ford had done with the high-school girls, no one contacted Maldonado to investigate her charges. Nor did anyone other than Ferris speak with Bennett. Shortly after Thanksgiving, Bennett then assaulted McClements on two occasions in the plant cafeteria.

McClements knew of none of this until June 2000. At that time, Maldonado, following up on a lead, told McClements what had happened to her and asked McClements if Bennett had sexually harassed her. McClements told Maldonado that Bennett had assaulted her on two occasions—but stated that she did not want to get involved (Cross App Apx, 61a-62a, Dep of McClements, 18-21).

In early 2001, McClements rebuffed another request to come forward from Maldonado. Later, she turned down a similar request from another of Bennett's victims, Pamela Perez (Cross App Apx, 70a, Dep of McClements, 134-136). In August 2001, however, Maldonado showed McClements a copy of the police report that described what Bennett had done to the high-school girls on I-275 (Cross App Apx, 60a, Dep of McClements, 16). As the mother of a young girl herself, McClements then decided to report what Bennett had done to her. As she testified, she came forward because of the cumulative effect on her of what Bennett had done to the high-school girls and to Lula

Elezovic, Justine Maldonado, Pamela Perez, and Shannon Vaubel (yet another Ford employee who reported that Bennett had assaulted her)(Cross App Apx, 66a-67a, Dep of McClements, 96-97).

In pleadings filed in the Maldonado case on August 9, 2001,[4] counsel advised Ford that McClements would testify that she, too, had been harassed by Bennett. Ford took her deposition on November 29, 2001. Even though Bennett was on administrative leave purportedly in order to investigate the sexual harassment charges against him, Ford has still taken no action to remedy the sexual harassment that Bennett perpetrated upon McClements—or upon anyone else.

C. The decisions of the circuit court and the Court of Appeals.

On August 2, 2002, Judge Wendy Potts of the Oakland County Circuit Court granted the defendants' joint motion for summary disposition under MCR 2.116(c)(10).

The circuit court held that McClements could not, as a matter of law, hold Ford responsible under the Elliott-Larsen Act because she was not employed by Ford (Cross App Apx, 45a, Cir Ct Op, 9). The court further held that even assuming *arguendo* that a non-employee could hold Ford responsible under the Act, McClements could not do so because she had not given notice to Ford of the abuse that she had suffered. Finally, the circuit court held, even if notice from others could sometimes be effective, the notice given by Maldonado to Howard and Ferris was not effective because they were, respectively, her relative and friend and were not "higher management." The circuit court did not mention the notice to Rush (Cross App Apx, 47a, Cir Ct Op, 11).

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[4] Maldonado set forth a report of what Bennett did to McClements in a description of McClements' anticipated testimony in her August 9, 2001, brief in support of her motion to add witnesses in her case. R. 209, *Maldonado v Ford and Bennett*, Wayne Cir Ct No 00-018619-NO, app lv pending Sup Ct No 126274.

On McClements' negligent retention claim, the circuit court found that "although Ford knew of the 1995 misdemeanor conviction," Ford had "no other notice of any behavior which would show Defendant Bennett had a propensity that would give rise to a claim of negligent retention" (Cross App Apx, 47a, Cir Ct Op, 11). To reach this conclusion in the face of the evidence in this record, the circuit court again declared that Ford had, as a matter of law, no notice of what Bennett had done to Maldonado because Howard and Ferris were not high management officials and were, in any event, Maldonado's uncle and friend (Cross App Apx, 47a, Cir Ct Op, 11). Once again, the circuit court did not discuss the notice to Rush.

McClements filed an appeal of right to the Court of Appeals. In an unpublished per curiam opinion on April 22, 2004, the Court unanimously held that the circuit court had erred as a matter of law in dismissing McClements' negligent retention claim. The Court of Appeals found that there was no requirement under the common law that the reports of abuse be received by "high management officials" (Cross App Apx, 54a, Ct App Op, 3). Moreover, the Court found, even if that standard did apply, "...there was testimony that Maldonado's complaints were referred to higher management authorities" (Cross App Apx, 55a, Ct App Op, 4). The Court held that "...whether Ford had knowledge of female employees who complained of Bennett's behavior was a question of fact" and accordingly remanded the negligent retention claim for trial (Cross App Apx, 55a, Ct App Op, 4).

The Court of Appeals affirmed the circuit court's decision dismissing McClements' Elliott-Larsen claim. Applying the "economic reality test," the Court concluded that Ford did not employ McClements. Because that was so, the Court held

that McClements had no claim under the Act. It assumed, but did not decide, that if McClements was not employed by Ford, she could not bring an action against Ford under the Act (Cross App Apx, 56a, Ct App Op, 5).

The Court of Appeals also ruled that the circuit court had properly dismissed McClements' Elliott-Larsen claim against Bennett under the authority of *Jager v Nationwide Truck Brokers*, 252 Mich App 464, 478, 485, 233 NW 2d 380 (2002), *lv den* 468 Mich 884 (2003). McClements filed no appeal to this Court on that issue.

ARGUMENT

I

McCLEMENTS MAY ASSERT A HOSTILE WORK ENVIRONMENT CLAIM AGAINST FORD UNDER THE ELLIOT-LARSEN ACT EVEN THOUGH SHE WAS NOT EMPLOYED BY FORD.

In deciding McClements' appeal, this Court must decide whether McClements, as an employee of AVI, may assert any claim under the Act against Ford, and, if so, whether she has stated sufficient facts to support such a claim in this case.

The first question—that is, whether she may assert a claim at all—is a question of statutory interpretation that this Court reviews de novo. *Roberts v Mecosta County General Hospital*, 466 Mich 57, 642 NW 2d 663(2002).

In answering that question—which is one of first impression in this Court—the Opinion of the Court of Appeals provides this Court with no assistance. That Court misstated the question before it, declaring that it had to determine "...whether the defendant Ford is plaintiff's employer for purposes of her CRA claim...."--a question on which there was no dispute (Cross App Apx, 56a, Ct App Op, at 5). Moreover, the Court of Appeals invoked the "economic reality test"—which might be applicable if

McClements asserted that Ford was responsible for actions of AVI because it controlled that company--but is irrelevant in judging McClements' claim that Ford was responsible for what Bennett did because Bennett was indisputably an employee of Ford (Ct App Op, at 5, citing *Ashker v Ford Motor Co*, 245 Mich App 9, 14, 627 NW 2d 1 (2001); *Seabrook v Michigan Nat'l Corp*, 206 Mich App 314, 520 NW 2d 650 (1994), and *McCarthy v State Farm Ins Co*, 170 Mich App 451, 455, 428 NW 2d 692 (1988)).

As the Court of Appeals neither decided whether McClements could bring an action under the Act against an employer other than her own—nor even discussed the method for answering that question—this Court must not only review the matter de novo, it must make a fresh start in determining whether McClements can bring such an action against Ford.

That is a question of statutory interpretation, and this Court has repeatedly held that the courts must begin with the words of the statute and must end there if the words provide a clear answer to the question at issue:

> An anchoring rule of jurisprudence, and the foremost rule of statutory construction is that the courts are to effect the intent of the Legislature [citation omitted]. To do so, we begin with an examination of the language of the language of the statute [citation omitted]. If the statute's language is clear and unambiguous, then we must assume the Legislature intended its plain meaning and the statute is enforced as written. A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself.
>
> *Roberts*, 466 Mich at 63.

In applying these principles, the court must "give effect to every word, phrase and clause in a statute" and must give "undefined statutory terms their plain and ordinary meanings." *State Farm Casualty Company v Old Republic Insurance Company*, 466 Mich 142, 146, 644 NW 2d 715 (2002).

Applying these principles makes clear that McClements has stated a valid claim under the Elliott-Larsen Act. That Act does not prohibit an employer from discriminating against "its employees"—or even against "employees" generally. It prohibits *an* employer from discriminating against *any* "individual" or "person:"

> *An employer* shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, discharge, or otherwise discriminate against *an individual* with respect to employment, compensation, or a term, condition, or privilege of employment, because of ...sex....
>
> ****
>
> (c) Segregate, classify, or otherwise discriminate *against a person* on the basis of sex with respect to a term, condition, or privilege of employment, including, but not limited to, a benefit plan or system.
>
> MCL 37.2202(1)(a), (c)(emphasis added).

The emphasized words make clear that Ford may be held liable under the Act by applicants or by persons who are being recruited—regardless of whether the company ever offers those persons a job. But the prohibition is even broader than that. The Act prohibits Ford from "otherwise discriminat[ing]" against *any* individual or person with respect to "a term, condition or privilege of employment." As the plain and ordinary meaning of "individual" and "person" includes men and women who are not employees or prospective employees of Ford, the clear wording of the statutory prohibitions makes clear that Ford—"an employer"—may not discriminate in any way against McClements—"an individual"—with regard to the terms, conditions and privileges of *her* employment.

Moreover, in a later section, the Act makes clear that Ford may not discriminate against McClements "directly or indirectly," nor may it "aid, abet, incite, compel or coerce" another person to violate the Act. MCL 38.2701(b) and (c). As these words

make clear, agents of Ford violate the Act if they "directly or indirectly" cause AVI to maintain a hostile work environment for its employees.

Finally, the Act's remedial section reaffirms the broad sweep of the protection afforded by its substantive prohibitions. The remedial section declares that a "person alleging a violation of this Act" may bring a civil action for relief—without any attempt to restrict the "person" asserting the violation to an employee of the defendant or, indeed, to an employee at all. MCL 37.2801(1).

The clear wording of the statute is thus sufficient by itself to sustain McClements' claim—and to require the reversal of the Court of Appeals decision dismissing her statutory claim. But two additional principles of statutory construction that this Court has use to construe the Elliott-Larsen Act make that conclusion even clearer.

First, as this Court has repeatedly held, the Elliott-Larsen Act is a remedial statute of "manifest breadth" that should be "liberally construed to suppress the evil and advance the remedy" of preventing discrimination in general and sexual harassment in particular. *Eide v Kelsey-Hayes*, 431 Mich 26, 34, 427 NW 2d 488 (1988). In the auto industry--but also in construction, medicine, and a host of other industries--there are frequently multiple levels of subcontractors and numerous employers working at the same site. As at Wixom, persons engaging in sexual or racial harassment will, in all likelihood, pick their victims from those employed by several employers. It does not further the purposes of the Act for the victims to have a claim if they happen to draw their paycheck from the same source as the harasser—but no claim at all under the Act if that is not the case. Nor does it further the purposes of the Act to impose on employers a duty to take reasonable steps to prevent their employees from harassing those employed by that employer—but to

impose no duty on them to prevent their employees from sexually or racially harassing others who work at the same site.

The second special principle of statutory construction makes it still clearer that the Court of Appeals erred. As this Court has repeatedly held, the Elliott-Larsen Act is patterned on Title VII—and the state courts should take guidance from precedent under the federal statute, particularly where the statutory language is the same. *Chambers v Trettco*, 463 Mich 297, 614 NW 2d 910 (2000).

In this case, the state Act's description of the prohibited acts is almost identical to the language of Title VII. Compare MCL 37.2202(1)(a), (c) with 42 USC 2000e-2(a)(1) and (2). Similarly, the State's remedial section allows any "person" to bring a civil action, while Title VII allows "any person claiming to be aggrieved by the unlawful discrimination" to bring an action. Compare MCL 37.2801(1) with 42 USC 2000e-5(b) and 42 USC 2000e-5(f)(1). In applying this essentially identical language, the federal courts have unanimously held that an employee who has suffered discrimination in her employment as a result of actions by employees of another company may sue that other company under Title VII.

In the leading case of *Sibley Memorial Hospital v Wilson*, 488 F 2d 1338, 1341 (CADC 1973), for example, the District of Columbia Circuit Court held that a physician dismissed from a residency program run by one hospital had a cause of action under Title VII against a second hospital that caused that dismissal by excluding him from a rotation that was an essential part of the residency program. The Court held as follows:

> The Act defines "employee" as "an individual employed by an employer," but nowhere are there words of limitation that restrict references to "any individual" as comprehending only an employee of the employer. Nor is there any good reason to confine the meaning of "any individual" to include only former

> employees and applicants for employment, in addition to present employees. Those words should, therefore, be given their ordinary meaning so long as that meaning does not conflict with the manifest policy of the Act.
>
> *Sibley*, at 1341.

Moreover, the Circuit continued, the remedial provisions of Title VII allowed any "person aggrieved" by discrimination to bring an action under that statute, thus making clear that a plaintiff need not be employed by a defendant employer in order to have a cause of action for discrimination against that employer. *Id.*

Similarly, the Second Circuit has held that an individual may maintain a Title VII claim against a company even though he is not an employee of that company under any common law definition of that term:

> However, it is generally recognized that the term "employer" as it is used in Title VII, is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an "employer" of an aggrieved individual as that term has generally been defined at common law.
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> *Spirt Teachers Ins & Annuity Ass'n*, 691 F 2d 1054, 1063 (CA 2 1982), *vacated and remanded on other grounds* 463 US 1223 (1983)(Title VII authorizes action against pension company that was not plaintiff's employer).

The Sixth Circuit likewise held that a scrub nurse employed by surgeons could maintain a cause of action under Title VII against a hospital that interfered with her employment by discriminatorily denying her privileges to practice in that hospital. *Christopher v Stouder Memorial Hospital*, 936 F 2d 870 (1991), *cert den* 502 US 1013 (1993). *Id.*, 936 F 2d at 875. *Accord. Pardazi v Cullman Medical Center*, 838 F 2d 1155 (CA 11 1988) and cases cited therein.

In a case with facts *absolutely identical* to those present here, the United States District Court for the Eastern District of Missouri applied these principles and held that

Chrysler *was* liable for the sexual harassment perpetrated by one of its supervisors upon a cashier employed by a vendor in that plant's cafeteria. The Court held that Title VII "...does not specify that the employer committing the unlawful employment practice must employ the injured employee," nor should such an interpretation be forced upon the statute because it would lead to the absurd result that the automaker could "allow a hostile work environment to exist" for the employees of the vendor that it could not allow for its own employees. *King v Chrysler Corporation*, 812 F Supp 151, 152 (ED Mo 1993).

Two other United States district courts have also directly held that a victim of sexual harassment may sue the employer whose agent perpetrated that harassment, even though the victim was never employed by that employer. *Moland v Bil-Mar Foods*, 994 F Supp 1061, 1072-1073 (ND Iowa 1998)(victim of sexual harassment can sue another employer sharing space with her company); *Diana v Schlosser*, 20 F Supp 2d 348 (D Conn 1998)(traffic reporter can sue talk show host employed by another company for sexual harassment under Title VII).

The plaintiff is aware of no conflicting authority from any state or federal court--and none has ever been cited.[5]

Nor should this Court become the first to so hold. As is obvious, Ford had overwhelming power over the environment in which McClements worked. To say that

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[5] Acting under the identical language of the Persons with Disabilities Act, MCL 37.1201 et seq, the Michigan Court of Appeals has held that "liability under the act is not dependent on the actual existence of an employer-employee relationship at the time of the adverse employment action" but rather on "the ability to affect adversely the terms and conditions of an individual's employment or potential employment." *Chiles v Machine Shop, Inc.*, 238 Mich App 462, 468, 606 NW 2d 398 (2000).

Ford could avoid liability for sexual assaults perpetrated by one of its top managers upon McClements would open the door to sexual, racial and other abuse of the employees of the vendors, subcontractors and other employers who happened to work in the Wixom plant. The language of the statute, its purpose, and the relevant precedent under Title VII all make clear that a "person" who is not employed by a company nevertheless has a statutory right of action against that company if its agents cause that employee to be discriminated against in *her* employment.

As McClements has an action against Ford whether she is employed by Ford or not—and whether Ford controls AVI or not—this Court should reverse the decision of the Court of Appeals and proceed to determine whether there is a genuine dispute of material fact as to whether Ford did breach the applicable standards requiring it to prevent sexual harassment at its Wixom plant.

II

McCLEMENTS PRODUCED EVIDENCE SUFFICIENT TO CREATE A FACTUAL QUESTION AS TO WHETHER FORD WAS AT FAULT FOR THE SEXUAL HARASSMENT THAT ONE OF ITS MANAGERS HAD INFLICTED UPON HER WHERE FORD HAD IGNORED PRIOR REPORTS THAT THAT MANAGER HAD SEVERELY HARASSED OTHER WOMEN DURING THE COURSE OF PERFORMING HIS DUTIES FOR FORD.

A. Standard of review.

As the Court of Appeals held that McClements could not bring any action under the Act against Ford, it did not reach the questions of whether McClements' work environment was hostile within the meaning of the Act or whether Ford was at fault for that hostile environment. The circuit court, however, did reach those issues, offering multiple reasons for its conclusion that Ford could not, as a matter of law, be held responsible for what Bennett did to McClements, even if she could bring an action under

the Act against Ford. As the circuit court dismissed McClements' Elliott-Larsen claim against Ford on a motion for summary disposition, this Court reviews this matter de novo. *Koenig v City of South Haven*, 460 Mich 667, 674, 597 NW 2d 99 (1999).

B. Bennett created a hostile working environment for McClements.

In *Chambers*, this Court held that an employee could establish a claim that she endured an unlawfully hostile work environment by proving by a preponderance of evidence the following elements:

> (1) the employee belonged to a protected group;
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> (2) the employee was subjected to communication or conduct on the basis of sex;
>
> (3) the employee was subjected to unwelcome sexual conduct or communication;
>
> (4) the unwelcome sexual conduct or communication was intended to or in fact did substantially interfere with the employee's employment or created an intimidating, hostile or offensive work environment; and
>
> (5) respondeat superior
>
> *Id.*, 463 Mich at 311.

There has never been a dispute that the plaintiff has set forth facts that satisfy the first three elements of the cause of action.

Nor has there been a serious dispute over the fourth element of the cause of action. Indeed, the circuit court, which ruled against McClements on every other point, assumed without deciding that McClements had shown that Bennett had engaged in "unwelcome sexual conduct" that substantially interfered with McClements' employment or that created an "intimidating, hostile, or offensive work environment" (Cross App Apx, 46a, Cir Ct Op, 10).

But in both the circuit court and the Court of Appeals, Ford has persisted in

arguing that the environment that McClements faced was not "hostile" because Bennett "only" kissed her twice. Even though this argument is transparently false, it is necessary to address it briefly.

This Court has held that a single incident of forced kissing is sufficient to support a claim of a hostile work environment. *Radtke v Everett*, 442 Mich 368, 501 NW 2d 155 (1993). Moreover, in this case, Bennett did not plant a peck on McClements' cheek. On two occasions, he assaulted her from behind when she was alone in the cafeteria. On each occasion, he grabbed her, forcibly spun her around, and attempted to jam his tongue in her mouth. On the second occasion, he asked where they could go for immediate sex--and told her that he knew that she "wanted it." See supra, at 4.

As a direct result of these incidents, McClements transferred to a different cafeteria. A year or more later, she was still disturbed by what Bennett had done to her. Although she saw Bennett infrequently, when she did see him, he smirked at her, as if to say that he had gotten away with something—and might do it again. See supra, at 5-6.

As is obvious, neither McClements nor any other woman should have to work in a plant where managers may grab and forcibly kiss her at any moment. Nor should she or any other woman have to work while looking over her shoulder to see what her manager might do next. Two assaults and batteries--coupled with a demand for immediate sexual relations, continuing fear of another assault, and reminders of the degradation she had already suffered--*define* an environment that is "intimidating, hostile, or offensive" to McClements, in violation of the Elliott-Larsen Act. *Chambers*, 463 Mich at 311.

As is evident, despite Ford's continuing arguments, McClements has provided more than sufficient evidence to support the fourth element of the cause of action

specified in *Chambers*.

C. Ford may be held at fault for Bennett's sexual harassment of McClements because it ignored prior reports that Bennett had severely harassed other women during the course of performing his duties for Ford.

1. The holding of *Chambers* makes clear that Ford could be held at fault for Bennett's harassment of McClements because it ignored prior reports of his severe sexual harassment of other women.

The heart of Ford's defense has always been its attempt to disclaim responsibility for Bennett's assaults upon McClements because McClements did not report those assaults to the company until August 2001.[6] Seizing upon an occasional phrase in *Chambers*, Ford asserts that it must have "...adequate notice that [the supervisor] was sexually harassing *plaintiff*" before it has a duty to do anything. *Id*, 463 Mich at 319 (emphasis added). Except where the harassment is open and public, Ford has asserted that neither it nor any other company can be held liable for sexual harassment unless it had notice that the particular plaintiff was being harassed.

The circuit court--aided by its misreading of a prior decision by the Court of Appeals[7]—adopted Ford's argument and stated as its definitive reason for granting Ford's motion that a company could not be at fault for the harassment "...simply because

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[6] The company, of course, received those reports within the period of the statute of limitations for claims of a hostile environment, MCL 600.5805(10) – and it admittedly took no remedial action against Bennett for his assaults upon McClements. Given the fact that Ford has *never* taken appropriate remedial action against Bennett for what he did to McClements, the fact that McClements did not report those assaults to the company until August 2001 may bear on her credibility before jury--but simply does not provide a basis on which the company can disclaim liability as a matter of law.

[7] The circuit court claimed reliance on *Sheridan v Forest Hills Public Schools*, 247 Mich App 611, 637 NW 2d 536 (2001), *lv den* 466 Mich 888 (2002). In that case, however, the employer had taken remedial action on one prior complaint and the other was not clearly about sexual harassment. *Sheridan* thus does not stand for the general proposition that a complaint by one employee can not serve to alert the company that a particular supervisor posed a danger of sexually harassing others.

it knew a co-worker had previously been sexually harassed by the same person" (Cross App Apx, 47a, Cir Ct Op, 11).

Apart from the minimizing of what Ford actually knew, there is a fundamental legal flaw in Ford's argument and the circuit court's decision. As is apparent, the language on which Ford rested its argument is pure dicta, for there was no evidence in *Chambers* or *Radtke* that the company had ever received notice from any other employee that the same man had harassed her. Moreover, as is to be expected where that issue was not presented, the *Chambers* opinion has conflicting dicta, with the Court sometimes stating that the company must have notice of "the alleged hostile work environment" or of the "substantial probability that sexual harassment was occurring"—without any requirement that the company know the names of the individual victims. *Id.* 463 Mich at 312, 313, 318.

As is obvious, the circuit court should have based its decision on the *holding* of *Chambers,* not on parsing together dicta from *Chambers* and *Radtke*. The holding of *Chambers* is very straight forward:

> Under the Michigan Civil Rights Act, an employer may avoid liability [in a hostile environment case] if it adequately investigated and took prompt and adequate remedial action upon notice of the alleged hostile work environment.
>
> *Id*, 463 Mich at 312 (internal quotations omitted).

The Court made very clear what the standard meant: "The bottom line is that in cases involving a hostile work environment claim, a plaintiff must show some *fault* on the part of the employer." *Id.* (emphasis in original). "Fault," the Court emphasized, was "...the essence of *Radtke's* requirement that a plaintiff prove that the employer failed to take

prompt and adequate remedial action upon notice of the creation of a hostile work environment." *Id.*

As is true in many areas of the law, there are many ways in which a person can be held to be at fault for injuries that have occurred. Moreover, in this case, there is clearly testimony that, if believed, demonstrated that Ford was decidedly at fault for what Bennett did to McClements. As set forth above, there is evidence that top Ford managers (1) ignored reports from the police that Bennett had used its car to follow and expose himself to the three-high school girls and (2) ignored two reports that on three occasions, Bennett had, while exposing himself, assaulted Maldonado, including one occasion where he followed her on I-275 and Michigan Avenue for that purpose. As a review of the descriptions of these events will reveal (see supra, at 6-9), Ford's officials thus ignored reports that Bennett had committed acts of sexual harassment so severe that they could have been charged as four counts of indecent exposure, three counts of assault and battery, three counts of criminal sexual conduct in the fourth degree (if not attempted rape), two counts of stalking, and, in all probability, one count of sexually-induced reckless driving.

In the face of such evidence, *Chambers* required Ford to investigate the charges—which it did not. Moreover, if the jury found that the evidence offered by the plaintiff was true, *Chambers* required Ford to take appropriate remedial action, not only to punish Bennett for what he had done, but, more importantly, to make sure that he did not harass others in the future. In this case, however, Ford not only did nothing in response to the reports it received as to what Bennett did—Bennett knew that it did nothing. When Ferris confronted Bennett, Bennett laughed in Ferris's face.

Less than a month later, Bennett began assaulting McClements. Under the *holding* of *Chambers* and *Radtke*, there was thus overwhelming evidence on which a jury could find that Ford was "at fault" for what Bennett did to McClements. It was thus a fundamental error of law for the circuit court to take the issue of Ford's fault from the jury and to decide for itself that Ford had done no wrong. *Chambers*, 463 Mich at 312.

2. The common law, which was adopted by Chambers as the governing standard for respondeat superior liability under the Elliott-Larsen Act, makes clear that Ford could be held at fault for Bennett's harassment of McClements because it ignored prior reports of his severe sexual harassment of other women.

That conclusion, which is clear enough within the four corners of *Chambers*, is even clearer in light of *Chambers'* explicit adoption of "common-law agency principles in determining when an employer is liable for sexual harassment committed by its employees." *Id*, 463 Mich at 311.

In fact, *Chambers* is simply a specific application of the general common-law principle that a master *could* be held liable for torts committed by his servants outside the scope of their employment if the master was "negligent or reckless" in one or more of the following ways:

> (b) in the employment of improper persons...in work involving risk of harm to others; or
>
> (c) in the supervision of the activity, or
>
> (d) in permitting, or failing to prevent, negligent or other tortuous conduct by persons...upon premises under his control.
>
> 1 Restatement Agency, 2d, s 213, at 458 and 1 Restatement Agency, 2d, s. 219(2)(b), at 481-482.

As summarized in the Restatement, for a century, this Court and numerous other courts had held that "...knowledge of [an employee's] *past* acts of impropriety, violence or

disorder" is "generally considered sufficient to forewarn" the employer of the dangers posed by that employee—and to make the employer liable for future torts perpetrated by that employee on his job, unless the employer took reasonable action to abate the danger to which it had been alerted. *Hersh v Kentfield Builders*, 385 Mich 410, 413, 189 NW 2d 286 (1971) (emphasis added). See also Prosser, Torts, 5th ed, at 502 ("[An employer] may, of course, be liable on the basis of any "on the basis of *any negligence of his own* in selecting or dealing with a servant")(emphasis added).

Neither Ford nor the circuit court has offered a reason to believe that this Court did not adopt that principle when it adopted the common law standards of agency in *Chambers*.

In fact, it would create an enormous double standard if this Court did not explicitly adopt that principle. As a non-employee, McClements can state a claim for negligent retention or supervision against Ford for the sexual harassment that she suffered as a result of Ford's failure to remedy the past complaints against Bennett. But if McClements can not assert a claim under the Act on the same basis, then Ford's employees may not do so. Since Ford's worker's compensation immunity prevents its employees from claiming that it negligently retained or supervised a manager, employees protected by the state civil rights statute would thus have less substantive protection under the Act than invitees had under the common law. That double standard can not be squared with the Act's intent to expand the remedies provided by the common law.

Indeed, there is, if anything, more need for holding a company responsible under the Act for failing to take action on past reports of sexual harassment than there is for holding a company responsible under the common law for failing to take action on past

reports of assault, dishonesty and the like. For as so clearly expressed in the conversation between McClements and Marquis, women do not report sexual harassment because they fear they will not be believed and will instead suffer retaliation if they do report. Note, *Notice in Hostile Environment Discrimination Law*, 112 Harv L Rev 1977, 1986-1991 (1999); Beiner, *Sex, Science and Social Knowledge: the Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 Wm & Mary J. Women & L 273, 312-322 (2001). As with rape, fear, hopelessness, shame and guilt combine to assure that only a small fraction of sexual harassment is ever reported. [8]

If that is so, and it obviously is, then it is particularly important to require that a company vigilantly investigate and remedy those complaints of sexual harassment that are actually filed. Not only in this case—but in many cases—the investigation of such a complaint may uncover other victims. And the imposition of a remedy for past abuse may save not only the complainant but many others from being victims in the future.

This Court should accordingly reverse the circuit court's opinion holding that as a matter of law McClements' could not claim that Ford was at fault for Bennett's harassment of her because it had ignored reports that he had sexually harassed others.

3. Unanimous precedent under Title VII, which has guided the interpretation of the Elliott-Larsen Act, makes clear that Ford could be held at fault for Bennett's harassment of McClements because it ignored prior reports of his severe sexual harassment of other women.

This Court has used precedent decided under Title VII to guide the interpretation of the state act on many occasions. *Chambers*, 463 Mich at 313.

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[8] Researchers have conducted surveys that estimate that at most 20 percent of the victims of sexual harassment on the job actually report that harassment to anyone in authority – Gruber, J.E. & Bjorn, L. (1982). Blue-collar blues: The sexual harassment of women autoworkers; *Work & Occupations*, 9(3), 271-298, Gutek, B. (1985). *Sex and the workplace*. San Francisco: Jossey-Bass.

In cases applying respondeat superior standards identical to those in *Chambers*, the federal courts have unanimously held that an employer could be held liable for a supervisor's sexual harassment of a woman who had not filed a report on the basis that it had previously ignored reports by one or more women who filed a report against the same supervisor.

Citing the common law discussed above, the Tenth Circuit, for example, held as follows:

> We believe that US West [the employer] may be put on notice if it learns that the perpetrator has practiced widespread sexual harassment in the office place, even though US West may not have known that this particular plaintiff was one of the perpetrator's victims.
>
> *Hirase-Doi v U.S. West Communications, Inc.*, 61 F 3d 777, 783-784 (CA 10 1995), citing Prosser and the Restatement of Agency.

Similarly, the Eleventh Circuit held that:

> A jury could reasonably infer from each of these allegations that World Services knew before Dees filed her complaint in August 1994 that supervisors were sexually harassing employees, yet failed to take any corrective action. We thus conclude that these allegations are sufficient to raise an issue of material fact as to whether World Services is both directly and vicariously liable for Dees' abuse, and that the district court inappropriately granted summary judgment in favor of World Services.
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> *Dees v Johnson Controls World Services, Inc.*, 168 F 3d 417, 423 (CA 11 1999).

Likewise, a United States District Court, citing voluminous precedent,[9] held that:

> Plaintiff may survive summary judgment by adequately substantiating that: [1] [Lt. Williams'] prior conduct toward other female employees should have alerted

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[9] Numerous other courts have also so held. See *Hurley v Atlantic City Police Department*, 174 F 3d 95, 110 (CA 3 1999), *cert den* 528 US 1074 (2000); *Hunter v Allis Chalmers Corporation*, 797 F 2d 1417, 1424 (CA 7 1986) (Posner, J); *Deters v Equifax Credit Information Services*, 202 F 3d 1262, 1271(CA 10 2000); *Jackson v Quanex*, 191 F 3d 647, 663-664 (CA 6 1999); *Paroline v Unisys Corp*, 879 F 2d 100, 107 (CA 4 1989), *rev'd on other grounds* 900 F 2d 27 (CA 4 1990).

> [Defendant] to the likelihood that he would, despite warnings, also try to harass [Plaintiff]. [2] Such notice...imposed a duty on [Defendant] to take *adequate steps to try to prevent her harassment, not merely act after the event.*
>
> *Munn v Mayor*, 906 F Supp 1577, 1584 (SD Ga 1995)(emphasis in original).

There simply is no support in *Chambers*, in the common law on which it is based, or in Title VII for the circuit court's conclusion that McClements could not, as a matter of law, hold Ford "at fault" for what Bennett did to her on the basis that Ford had done nothing to remedy repeated acts of severe sexual harassment perpetrated by Bennett upon women inside and outside the Wixom plant.

In fact, it would make a mockery of the Elliott-Larsen's proud status as a "remedial statute of manifest breadth" to say that Ford was not responsible for Bennett's assaults upon McClements even though the company ignored prior reports that Bennett had committed four prior acts of severe harassment that constituted over a dozen crimes under the law of the State of Michigan.

D. The circuit court erroneously held that Ford's failure to take action after it learned that Bennett had used its M-10 car to expose himself to the high school girls was irrelevant as a matter of law to McClements' Elliott-Larsen claim.

The circuit court held that Ford's failure to take remedial action after it learned that Bennett had used an M-10 car to expose himself to high-school girls was irrelevant to McClements' claim under the civil rights statute because "[t]he facts out of which the conviction arose occurred outside of the work place and thus the behavior could not have caused or been notice of an offensive working environment" (Cross App Apx, Cir Ct Op on Recons, 7).

But the circuit court did not even consider whether the M-10 events put Ford on notice that Bennett posed a danger of *creating* a hostile work environment--and that Ford

could be held at fault if it took no action to abate that danger. In its opinion, the circuit court failed even to recognize that it had no right to decide as a matter of law that the M-10 events were irrelevant--because a rational jury that heard of Bennett's attempt to terrorize high-school girls could conclude that he presented a clear danger of harassing women in other circumstances.

In particular, a rational jury could conclude that a man who drove down I-275 with his penis exposed might not make fine distinctions as to whether he harassed women inside or outside the gates of the Wixom plant. In fact, a rational jury could reasonably conclude that Bennett posed a *greater* danger in the plant, because if he was so brazen in on a public highway, he could do something far worse in the secluded corners of huge plant in which the management supported him and in which there were many women over whom he exercised considerable power.

But if the circuit court erred by holding that the M-10 events standing by themselves did not, as a matter of law, alert the company to the danger that Bennett posed, it committed an even more serious error of law by holding as a matter of law that those events could be considered separately from the totality of the circumstances known to the company.

As this Court held, the jury can only assess the reasonableness of a company's response in light of the "totality of the circumstances" known to the company. *Chambers*, 463 Mich at 319. The totality of the circumstances known to Ford as to the danger that Bennett posed clearly include what he did to the high-school girls *and* what he did to Maldonado.

The two events must be considered together. Whatever doubt the M-10 events left as to whether Bennett would repeat his harassment inside the Wixom plant, the reports by Maldonado erased that doubt. And whatever doubts that the company may claim to have had as to the veracity of Maldonado's reports—the reports by the three high-school girls obviously should have decreased those doubts.

In *Elezovic* and *Maldonado*, the Court of Appeals erred by taking from the jury the M-10 events under the claimed authority of MRE 403, because the exclusion of that evidence made it impossible for the jury to assess whether Ford acted reasonably in light of the "totality of circumstances" known to it. *Elezovic v Ford and Bennett*, 259 Mich App 187, 205, 673 NW 2d 776 (2003) *lv granted*, Sup Ct No. 125166; *Maldonado v Ford and Bennett*, 2004 WL 868657, 28 (2004) *app lv pending* Sup Ct No. 126674. In this case, the circuit court went even further, holding that that evidence was irrelevant as a matter of law.

That holding defies *Chambers*' requirement that the jury be allowed to assess the totality of the circumstances known to the jury. It also defies the common law source of *Chambers*, which has long held that even pre-employment and purely off-duty misconduct can give a company notice of a danger that a particular employee poses in the workplace.

In fact, given that the Court of Appeals rightly held that Ford's failure to take action on reports of Bennett's prior acts of misconduct—including the abuse he perpetrated in the M-10 car—gives grounds for a common-law negligent retention claim, there is no basis for excluding that evidence from the notice considered under the Act,

because the events on I-275 give *equal* notice of the danger that Bennett poses to employees of vendors and of Ford.

Finally, the circuit court's conclusion also defies the most analogous precedent under Title VII. In considering a case where an airline received notice that one of its male flight attendants had raped a female attendant in a hotel during an overseas layover, the Second Circuit directly held that receipt of the report of that crime imposed on the company a duty to take reasonable steps to protect its other employees from future assaults by the same male attendant. In words that apply with full force to Ford's duty when it learned what Bennett had done on I-275, the Circuit held that even though the company might have no duty to act if it received reports of minor off-duty misconduct, it could not simply stick its head in the sand when it received reports of serious off-duty sexual misconduct by one of its employees:

> The more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard of reasonable care to take steps for the protection of likely future victims. The district court may have been correct that Delta's ability to investigate was curtailed by the fact that the [earlier] rapes occurred off-duty. It does not follow, however, that the off- duty nature of the rapes absolved Delta of all responsibility to take reasonable care to protect co-workers...
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> *Ferris v Delta Air Lines, Inc.*, 277 F 3d 128, 137 (CA 2, 2001), *cert den* 537 US 824(2002).

The facts of *Ferris* are not identical to those present here. But in most ways, when considered, as it must be, as part of the totality of circumstances known to Ford, Bennett's exposing himself to the teenage girls provided *stronger* notice to Ford of the danger that Bennett posed in the workplace than Delta had in *Ferris*.

Bennett's crime was clearly serious—and, especially when combined with his assaults on Maldonado, the notice of those multiple serious crimes created a foreseeable

risk that he would perpetrate other serious sexual harassment at Wixom. Moreover, as to the M-10 events, Ford did not have the usual case of a disputed report from one victim alone--it had three eye witnesses, soon corroborated by a conviction after a full trial on the merits.[10] Furthermore, Bennett's sexual misconduct did not occur while he was off-duty in a hotel—it occurred as he test drove Ford's car at a time when he was clearly subject to Ford's rules. Finally, Bennett was not a flight attendant—but a high-level manager supervising women working in remote areas of the plant at all hours of night.

After Ford received the reports of what Bennett had done to Maldonado, the danger in the workplace was no longer merely a foreseeable risk--it had actually occurred. In taking the M-10 events out of the "totality of the circumstances" that the jury was to consider—and in holding as a matter of law that these events gave no notice to Ford of the danger that Bennett posed, the circuit court disregarded *Chambers*, the common-law, Title VII—and common sense.

Moreover, by openly protecting Ford from the consequences of its own inaction on the M-10 abuse, the circuit court made a mockery of the claim that the Elliott-Larsen Act should be construed liberally so as to eradicate sexual harassment from the workplaces of the State.

This Court should therefore reverse the decision of the Oakland County Circuit Court and hold that Ford's inaction in the face of Bennett abuse of the high-school girls--

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[10] In addition to the events on I-275 and the reports to Ford about those events, Bennett's conviction should also be admissible since it powerfully confirms the reports that Ford received from the police. See *Waknin v Chamberlain*, 467 Mich 329, 653 NW 2d 176 (2002). Moreover, in this case, the expungement of that conviction in 2001 is irrelevant, because the crucial facts are the knowledge that Ford had and the actions it took in November 1998, when the conviction was in full force and effect for all purposes. Whatever other effect the expungement may have, it cannot retroactively change what Ford knew and what Ford did in 1998.

when considered, as it must be, in conjunction with the notice from Maldonado--was more than sufficient to require a jury to determine whether Ford breached its statutory duty to protect women employees from future sexual harassment like that Bennett soon perpetrated upon McClements.

E. The circuit court erroneously held that Ford could as a matter of law disregard the reports that Maldonado provided.

The circuit court concluded its Opinion by holding that Maldonado's reports to the production manager and an official in labor relations did not, as a matter of law, provide notice to Ford of the abuse that Maldonado had suffered.

To begin with the circuit court's entire discussion of the reports that Maldonado gave to Howard and Ferris is irrelevant because that court simply ignored the evidence that Ferris conveyed Maldonado's reports one day later to Jerome Rush, the Director of Labor Relations at Wixom. See supra, at 10-11. As notice to the Director of Labor Relations is presumably notice to the company, the circuit court's claim that Ford did not know of Bennett's abuse of Maldonado has no factual basis at all.

Beyond that, the circuit court's attempt to ignore the notice that Maldonado gave to Howard and Ferris is replete with legal and factual errors. The circuit court first claimed that it could disregard Maldonado's reports as a matter of law solely because Howard was her uncle by marriage and Ferris had been a friend:

> The Court finds [that] although Maldonado's uncle [Howard] and friend [Ferris] were employed at the Wixom facility, the unofficial complaints were made to those persons because they were friends and/or relatives, not because they were high level officials or supervisors.
>
> (Cross App Apx, 46a, Cir Ct Op, at 10).

But the circuit court offered no factual support for its claim that Maldonado filed complaints with these officials *because* she knew them rather than because they were company officials. In fact, Maldonado undoubtedly filed complaints with them because they were both persons whom she knew *and* company officials whom she believed to be in a position to do something about her complaint.[11]

In any event, the question is not Maldonado's motivation for filing charges with these officials--but the duty of those officials when they received her charges. On that crucial point, there is clearly no law, nor should there be, that Howard and Ferris were free to disregard the reports because Maldonado was their relative or friend.

Having reached findings that could not be supported factually or legally, the circuit court then opined that the complaints to Howard and Ferris were in any event ineffective, because they were not "high management officials;"

> Complaints must be made to higher management which means someone in the employer's chain of command who possesses the ability to exercise significant influence in the decision making process of hiring, firing, and disciplining the offensive employee. See *Chambers v Trettco*, and *Sheridan v Forest Hills Public Schools*, both supra. Neither Maldonado's uncle or friend meet these qualifications.
>
> (Cross App Apx, 47a, Cir Ct Op, at 11).

How Howard, who reports to the deputy plant manager, is not part of "higher management," the circuit court did not say. Nor did it explain how Ferris, a former superintendent on assignment in Labor Relations, is not high enough to receive a report of sexual harassment.

But the circuit court's errors go even further. Ford's policy on sexual harassment

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[11] Her choice is undoubtedly typical, as many women file such obviously painful and potentially embarrassing reports with those company officials whom they most trust.

specifically informs employees that they can report sexual harassment to "*your* supervisor or manager" or "*your* local Human Resources representative (Cross App Apx, 122a) (emphasis added). Moreover, it specifically tells employees that *any* manager who learns of a complaint of sexual harassment has a *duty* to report that complaint to Human Resources (Cross App Apx, 122a, quoted supra, at 9). Maldonado acted in compliance with Ford's own policy in the way she filed her complaints--but the circuit court's decision turns that policy into a trap for the unwary.

Finally, the circuit court's decision in this case is an excellent illustration of why the Court of Appeals erred in *Sheridan* when it held that complaints of sexual harassment—unlike all other complaints—must be conveyed to higher management in order to be effective. *Sheridan v Forest Hills Public Schools,* 247 Mich App 611, 637 NW 2d 536 (2001), *lv den* 466 Mich 888 (2002). There is no basis for that requirement in *Chambers* or in the common law on which *Chambers* is based. Nor should there be such a requirement. Like Maldonado and McClements, the average employee has no way of knowing who is, and is not, a "high management" official. Especially where the offending official is, like Bennett himself, a high management official, it makes no sense to require a woman traumatized by sexual harassment to locate an official with a higher pay grade than her harasser--and to march past security and the clerical staff in order to file a complaint of sexual harassment.

In a decision that is directly on point, Judge Posner has trenchantly criticized the requirement that complaints of sexual harassment be conveyed to "high management." In the absence of a clear policy stating that employees *must* complain to particular

officials (and "perhaps even then"), he held that the employer may *not* ignore a complaint because it was not given to a "high management official:"

> ...[W]hat is certain is that if the company fails to establish a clearly marked, accessible, and adequate channel for complaints, judicial inquiry will have to turn to who in the company the complainant reasonably believed was authorized to receive and forward (or respond to) a complaint of harassment.
>
> *Young v Bayer Corp*, 123 F 3d 672, 674 (CA 7 1997).

As Judge Posner continued, the complaint is effective if it

> ...[e]ither (1) come[s] to the attention of someone who (a) has under the terms of his employment, or (b) is reasonably believed to have, or (c) is reasonably charged by law with having, a duty to pass on the information to someone within the company who has the power to do something about it; or (2) come[s] to the attention of such a someone.
>
> *Id.*, at 674.

The Third Circuit followed this well-reasoned decision, and the Second Circuit independently adopted a similar standard. *Bonenburg v Plymouth Township*, 132 F 3d 20, 27 n 7 (CA 3 1997); *Torres v Pisano*, 116 F 3d 625, 636-638 (CA 2 1997), *cert den* 522 US 997 (1997).

In this case, Maldonado complained to the Production Manager and an official in Labor Relations, who, in turn, relayed the complaint to the Director of Labor Relations. The Production Manger and Director of Labor Relations are clearly officials charged with the power to do something about Maldonado's complaint; all three officials are certainly persons who are charged by law and by Ford's policies with a duty to convey the complaint to a person who does have that authority; and all three are at the very least officials whom the reasonable employee would regard as having such authority or such a duty.

Indeed, the circuit court's entire discussion of Maldonado's notice is permeated with unreality. The simple fact is that top officials at the Wixom plant *knew* what Bennett did to the young women on I-275 *and* what he did to Maldonado. They chose either not to believe those reports or to regard them as unimportant. They should not now be allowed to pretend that Ford saw no evil, heard no evil, and spoke no evil---where the reports of evil and evil itself were so obviously present.

This Court should set aside the circuit court's conclusion that Ford had no notice of what Bennett did to Maldonado. Beyond that, it should reverse the circuit court's entire decision that Ford, as a matter of law, had no liability under the Act for Bennett's sexual assaults upon McClements even though the company had completely ignored repeated, clear reports that Bennett had sexually harassed four other victims.

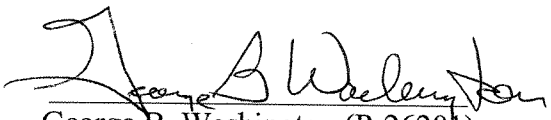
In a word, this Court should hold that the circuit court erred by declaring that the Elliott-Larsen Act allows a company to ignore for three years sexual harassment perpetrated by a manager that is so serious that it constituted multiple misdemeanors and felonies—and then be absolved of liability as a matter of law when that manager strikes his next victim.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated, McClements asks this Court to sustain her cross appeal by reversing the decision of the Oakland County Circuit Court and by reversing that part of the decision of the Court of Appeals that dismissed her claim under the Elliott-Larsen Act. She asks that this Court remand this matter for trial on her claims under the common law and under the civil rights act.

By Plaintiff-Appellee's and
Cross-Appellant's Attorneys,

SCHEFF & WASHINGTON, P.C.

BY: 

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